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No. 01-

IN THE

Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC., and AMERITECH CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, consumers challenge as anticompetitive on antitrust grounds the merger of two "baby Bells" considered by the Federal Communication Commission ("FCC") as each other's "most significant market participants." In light of the recurring issues and public importance of telephone industry reconsolidation and its antitrust effects after deregulation of local telephone service spurred on by the 1996 Telecommunications Act, the question presented is:

Whether, in light of the 1996 Telecommunications Act's deregulation of local telephone service, the Clayton Act, 15 U.S.C. § 18, enables consumers to challenge mergers of deregulated competitive baby Bells over the assertion that the 1914 "common carrier line extension proviso" (intended to cover line extensions of common carriers such as trucks, railroads and other regulated entities) exempts telecommunication mergers, as well, from any antitrust scrutiny?

PARTIES TO THE PROCEEDING

The following are the parties to the proceeding:

The Petitioners: South Austin Coalition Community Council ("SACCC"), Walter E. Ryan Jr., Theodore Chabraja, Anita B. Hull, Robert Rifkin and Patrick A. Steffes.

The Respondents: SBC Communications Inc. ("SBC"), a Texas corporation headquartered in San Antonio, Texas, and Ameritech Corporation ("Ameritech") a Delaware corporation headquartered in Chicago, Illinois.

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SACCC *et al.* respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, is reported at *South Austin Coalition Community Council et al. v. SBC. Comm. Inc.*, 274 F.3d 1168 (7th Cir. 2001) and is reprinted in the appendix hereto at 1a. Rehearing *en banc* was denied, and the order is reprinted in the appendix hereto at 42a.

The opinion and order of the United States District Court of the Northern District of Illinois, Eastern District (Manning, J.) granting and entering judgment for SBC and Ameritech is reported at 2001 U.S. Dist. LEXIS 9850, and is reprinted in the appendix hereto at 11a.

STATEMENT OF JURISDICTION

The District Court's jurisdiction was based upon 15 U.S.C. § 4 and 28 U.S.C. § 1331. The Appellate Court had jurisdiction pursuant to 28 U.S.C. § 1291.

The Opinion of the Seventh Circuit Court of Appeals was entered December 19, 2001. A timely petition for rehearing *en banc* was filed on January 2, 2002, and was denied on February 4, 2002.

Jurisdiction of the Supreme Court of the United States to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statute is 15 U.S.C. § 18, which is reprinted in the appendix hereto at 44a.

INTRODUCTION

This case presents a recurring issue of public importance about antitrust scrutiny in telecommunication mergers, in light of the enactment of the Congressional policy of deregulation apart of the the 1996 Telecommunications Act.[1]

The United States Court of Appeals for the Seventh Circuit entered its decision on December 19, 2001 upholding the Petitioners standing, as customers, to challenge the merger, but found antitrust scrutiny precluded by the third paragraph of 15 U.S.C. § 18 (the common carrier line extension proviso) intended in 1914 to preclude scrutiny to a market-expanding acquisition by a non-competitor, strictly regulated as to its own entry.

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1. This Court has reviewed many issues raised by the enactment of the 1996 Telecommunications Act, including issues impacting restructuring of local markets and ILEC rates. *AT&T et al. v. Iowa Utilities Board et al.*, 525 U.S. 366 (1999) (restructuring of local telephone markets); *National Cable & Telecommunications Association Inc. v. Gulf Power et al.*, 534 U.S. 327 (2002) (pole attachments); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (scrambling issues); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act); *Verizon Comm. Inc. v. FCC et al.*, 531 U.S. 1124 (2001), *WorldCom, Inc. et al. v. Verizon Comm. Inc. et al.*, 531 U.S. 1124 (2001), *FCC et al. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001), *AT&T Corp. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001), *General Comm. Inc. v. Iowa Utilities Board et al.*, 531 U.S. 1124 (2001) (interconnection rates and ILECs)

This case is of utmost public importance because it creates a giant and unanticipated loophole, completely frustrating Congressional purpose both from 1914 and 1996, and would preclude both the government and private parties from any relief now and in future telecommunication mergers. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (important issues addressed "to the public as distinguished" from the "parties" to the litigation). The issue Petitioners seek certiorari for prospectively allows for the reconsolidating of all the "baby Bells" without authority for any entity, private or governmental, to challenge on an antitrust basis. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1995) (the issue posed by this case is direct and immediate to all local telephone customers, not merely an "academic or [] episodic" issue); Stern, *Supreme Court Practice*, 6th Ed., at 213.

With the enactment of the 1996 Telecommunications Act and the deregulation of the telephone industry, this first impression issue and error of the Court of Appeals is likely to have serious consequences soon replicated by the recombination of baby Bells among themselves, or with other major long distance carriers or cable television companies. *See* Stern, *Supreme Court Practice*, 6th Ed., at 223 *citing*, Baker, *A Practical Guide to Certiorari*, 33 Cath. U.L. Rev. 611, 619 (1984). The Appellate Court's interpretation is clearly in error — relying upon a single case interpreting the clause in far different factual circumstance, not in the context of telephone deregulation or enactment of the 1996 Telecommunications Act.

STATEMENT OF THE CASE

The Trial Court Decision.

Ameritech customers in Illinois challenged the merger of SBC and Ameritech seeking injunctive relief because the "effect of such acquisition may be substantially to lessen competition or tend to create a monopoly." The merger eliminated the only actual and potential competition regarding price and quality of residential phone service in the relevant market (Chicago, Illinois area as well as St. Louis, Missouri, area).

Plaintiffs plead, and the post-merger record demonstrated actual and threatened injury in the form of price increases, ongoing admitted lack of quality service, and a lack of consumer choice for local telephone service. The merger eliminated the sole competitor and strongest, most likely potential full scale competitor each faced.

Plaintiffs filed their complaint after the final agency review as directed in *SACCC et al. v. SBC. Comm. Inc.*, 191 F.3d 842, 845 (7th Cir. 1999), based on the findings of the FCC and state public utility commissions that actual and potential competition was squelched, an increase in the Herfindahl-Hirschman Index of over 400 points, and other facts showing increase in prices and decrease in service.

The District Court dismissed the case for a "lack of standing," stating that three agencies had previously reviewed the merger and Plaintiffs' complaint lacked specificity in alleging an antitrust injury.

The Appellate Court Decision.

The Appellate Court held, "official approval does not immunize a phone merger against private antitrust challenge" *citing* 15 U.S.C. § 18, and holding that the "private plaintiffs are free to seek divestiture." *SACCC*, 274 F.3d 1168, *citing*, *California v. American Stores Co.*, 495 U.S. 271 (1990).

The Court of Appeals went on to hold that Plaintiffs alleged "a diminution in potential competition, rather than a merger between firms currently competing in overlapping markets," and that "an exception to § 7 of the Clayton Act carves out of its scope a merger of common carriers that do not directly compete."

The Court held that SBC and Ameritech are common carriers "extending" its lines by merger, with "no substantial competition between" them. The Court relied on the lone decision *Navajo Terminals, Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979), where the appellate court applied this language in a motor carrier case.

The Facts of the Case.

In the spring of 1998, SBC and Ameritech, Incumbant Local Exchange Carriers ("ILEC") announced their intention to merge. At that time, the two ILECs created by the break up of AT&T, were actually competing and had intentions and plans to enter each other's territories. The FCC concluded that the Respondents were the most significant potential entrants for providing competitive local service.[2]

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2. "Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market and was actively implementing

(Cont'd)

The Petitioners filed their initial case which was dismissed as not ripe and was affirmed on appeal, *SACCC et al. v. SBC Comm. Inc.*, 191 F.3d 842 (7th Cir. 1999) (with the proviso that Plaintiffs' claim could be refilled if and when final merger terms were determined). Plaintiffs refilled their complaint shortly after the final agency review as directed in *SACCC*, 191 F.3d at 845.

No factual discovery occurred. However, a factual record was developed in the pleadings based upon the findings of the FCC, the Department of Justice, and the Illinois Commerce Commission ("ICC") and other state public utility commissions. Because of the importance of quality local phone service a large press record also developed, as well as

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(Cont'd)

> those entry plans at the time the merger was announced. Once the proposed merger was announced Ameritech suddenly abandoned these plans." FCC Order at ¶ 78.
>
> "The evidence in the record indicates that SBC had plans to enter the mass market in Chicago building off its cellular base in that city, and could thus be viewed as a potential entrant into this market." FCC Order ¶ 82.
>
> Thus, both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions based on Ameritech's expansions into St. Louis (in SBC's territory) which would have occurred but for their merger, and SBC's plans to expand into Chicago (in Ameritech's territory). The FCC "conclude[d] that SBC was a significant potential entrant into Ameritech's region." FCC Order ¶ 77, 78 & 83.

a post-merger record based on FCC and ICC fines for poor SBC service and failure to meet certain conditions.

The resulting company after the merger controls essentially all local phone service in the areas that it services.[3] It was alleged the new company will control 31% of the Telephone Access Line Market in the United States, and because of SBC's prior combination with Pacific Telesis in California, the merger reconsolidates three of the original seven Bells (Ameritech, Southwest Bell, and Pacific Telesis).

Prior to announcing the merger, Ameritech planned and declared its intention to enter SBC's St. Louis market in order to compete for local telephone service customers. Plaintiff alleged, and the FCC's Order bore out, the merger eliminates the very likely possibility of SBC and Ameritech competing against each other in the most likely new expansion areas (i.e. each other's neighboring pre-merger markets). SBC has also experimented with plans for entering local markets with its Rochester, New York Plan.[4] SBC had also sought and received authorization to conduct local service in Illinois.

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3. Besides the ILECs Bells, approximately one dozen "competitive local exchange carriers" ("CLECs") compete for local telephone service. There is little actual competition generated by CLECs, they control less than 1% of local telephone lines. Further, CLECs face tremendous barriers to entry into new markets. Since the merger, these figures have remained relatively constant. Van, *Finding Disputes Ameritech Claim of Competition*, Chicago Tribune, April 18, 2001.

4. The FCC Order "conclude[d] that Project Gateway was cancelled because SBC and Ameritech *preferred to merger rather than compete in the mass market for local exchange and exchange access service in St. Louis and perhaps elsewhere*." FCC Order at ¶ 79. (Emphasis added). (App. at 49a)

The FCC Order explicitly found SBC and Ameritech had plans to enter each other's regions, and these plans were abandoned by the merger. *See* FCC Order at ¶¶ 77, 78. (App. at 48a).

The FCC Order also stated SBC was a "significant potential entrant" into the Chicago residential market. *See*, FCC Order at ¶¶ 81, 82, 83. (App. at 50a-54a).

The post-merger record demonstrated antitrust damages prevalent in the factual record. SBC continues to factor in payments of millions of dollars each month as a toll charge to regulators for poor service and a lack of competition. SBC's post-merger exercise of monopoly power includes a recurring deterioration of service combined with drastically increased charges to consumers. SBC has continued paying fines in the millions to the regulators without paying anything to the class. SBC's antitrust fines are easily absorbed as a minimal cost of business, without benefit to the class.

There Is Still Virtually No Meaningful Competition/ Choice for Local Phone Customers. CLEC's share of end-users lines served at 5% in Illinois; FCC Report, *Local Telephone Competition at the New Millennium*, Released August 31, 2000, Table 4, "End-User Lines Served by Reporting LECs: Year-End 1999.

Illinois Local Residential Service has Substantially Worsened. The State of Illinois has made findings of poor service to competitors and failing to meet merger conditions. Van, *Ameritech Assessed $873,500 For Service Faults*, Chicago Tribune, September 23, 2000. The press report stated, Ameritech payments were "to compensate [competitors] for inadequate service" attributed to an

unnamed Ameritech spokesman. *Shockingly*, only a few months earlier, Ameritech's President of Illinois, Joset Wright, said, "Ameritech is in full compliance . . . [t]here's not one condition that we haven't met." Van, *SBC not complying with ICC, rivals say*, Chicago Tribune, May 10, 2000; Ameritech Letter, Mr. Mueller informing customers of the $19 credit for a lack of "quality service."

On July 25, 2001, the Chicago Sun-Times reported, Ameritech paid $24 million in the last 12 months for failing to meet competitive standards. Fendelman, *Ameritech Sets Record With Fine Amount in May*, Chicago Sun-Times, July 25, 2001; SBC has paid "$69 million in penalties" since December for "substandard wholesale phone service" to the federal government, but would have paid $106 million if the fines were not capped. Young, *SBC Has Paid Big Penalties For Poor Service to Rivals*, Wall Street Journal, August 8, 2001.

Major Increase in Fees and Other Charges By SBC. In August 2000, SBC/Ameritech sought a $2 a month hike in the residential phone rate. Van, *Ameritech files for higher line charge*, Chicago Tribune, August 4, 2000.

Sharp Marketing Practices. SBC raised rates on 411 information calls (raised to 95 cents from 30 cents); and increased rates by 25% for local calls; SBC also squeezed consumers by requiring its employees to convert every customer contact into a high power sales pitch for higher-priced premium services regardless of whether a particular customer would benefit from the program Jones, Crain's Chicago Business, *Telcom Rate Showdown For SBC-Ameritech*, Feb 28, 2000; Manor, Chicago Sun-Times, *Ameritech Under Fire, CUB to take action against sales method*, March 8, 2000; and Editorial,

Information Tollways, Chicago Sun-Times, Feb. 18, 2000; Manor, Chicago Sun-Times, *Ameritech hikes some local calls*, Jan. 27, 2000; Manor, Chicago Sun-Times, *411 calls jump to 95, Ameritech hikes rates*, February 17, 2000; Van, Chicago Tribune, *Ameritech files for Higher Line Charge*, August 4, 2000.

Unique Among the Baby Bells, SBC Continues to Turn a Profit. The FCC reported that total telecommunication revenues including local services for incumbent LECs rose from $108,234 (Shown in Millions) in 1998 to $112,216 in 1999. FCC Report, *Local Telephone Competition at the New Millennium*, Released August 31, 2000, Table 7 "Total Telecommunications Revenue."

SBC Threatens to Worsen Service Further. In its monopoly position SBC is now able to threaten to reduce service further unless Illinois regulators lessen oversight. Holt, *Ameritech Threatens State with Cutbacks*, Chicago Tribune, March 14, 2001.

Finally, this case occurs in the context of the consent decree that broke up AT&T. The consent decree was "replaced" by provisions of the Telecommunications Act of 1996. *SBC Comm., Inc. et al., v. FCC*, 981 F. Supp. 996, 1000 (N.D. Tex. 1997). Further, "deregulation" properly characterizes the industry since enactment of the 1996 Act. *SACCC*, 191 F.3d at 843, ("[f]ederal legislation during the late 1990s relieved the Baby Bells of many strictures adopted in 1983 . . . setting the stage for more competition"). *See* H.R. Rep. No. 104-204, pt. 1, at 48-50 (1995).

REASONS FOR GRANTING THE WRIT

This case poses important reoccurring public questions of antitrust oversight of the telecommunications industry in the initial stages of deregulation created by the Congressional enactment of the 1996 Telecommunications Act spurring unrivaled industry consolidation[5]. Since deregulation, telecommunication giants have been merging, baby Bells reconsolidating, and consumers (particularly in this case) have received less service at greater prices without consumer choices, as telecommunication giants, like SBC, have been willing to pay fines as toll charges to public agencies for continued slack oversight based on a public interest standard — not an antitrust basis.[6]

In this case the decision of the United States Court of Appeals for the Seventh Circuit disregarded the caution by which courts examine exemptions from the antitrust laws. *Chicago Prof. Sports Ltd. v. National Basketball Ass'n*, 961 F.2d 667, 672 (7th Cir. 1992). In this case, the Court of Appeals summarily created a major loophole in antitrust enforcement and telecommunications policy. The Court of Appeals held that the local telephone companies created by the break-up of AT&T can merge back together free of any antitrust scrutiny. The decision is not only contrary to the plain meaning of the text of the Clayton Act as the statute

5. For example, NYNEX and Bell Atlantic, PacTel and SBC, and WorldCom and MCI.

6. *See*, FCC Commissioner Powell, *Opening Statement* Before the Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce on The Telecommunications Merger Act of 2000, March 14, 2000 (contrasting FCC review with that of the federal antitrust authorities).

was understood by lawmakers in 1914, and the original intent of that provision, but it completely contradicts Congressional intent in refashioning telecommunications policy in the Telecommunications Act of 1996.

The Seventh Circuit's construction of § 7 of the Clayton Act is contrary to Supreme Court jurisprudence requiring broad construction of general laws like the Clayton Act, and narrow construction of special interest exemptions. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

I. The Plain Meaning and Legislative History of "Common Carrier" in 15 U.S.C. § 18, Refers to Entities Which Are *Regulated* Common Carriers and Was Never Intended to Apply to the Merger of Companies Such as SBC and Ameritech That Were Free to Enter Each Other's Markets.

When Congress created the anti-merger provisions of the Clayton Act, 15 U.S.C. § 18, it included a paragraph providing that the statute would not prevent a "common carrier from extending any of its lines [through the acquisition of] any other common carrier where there is not substantial competition between [them]." The first sentence of this same paragraph makes it applicable only to "any common carrier subject to the laws to regulate commerce." Courts who employ a textualist approach to statutory interpretation insist that a statute be construed on the basis of which meaning is "most likely to have been understood by the *whole* Congress which voted on the words of the statute." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). In 1914, the concept of a regulated common carrier free to enter another geographic market without

encountering substantial regulatory barriers, in order to compete with the dominant regulated common carrier in that new market, was completely foreign. Thus, that phrase must be construed to refer only to those common carriers whose entry, as well as price or other aspects of doing business, was regulated by the government.

The legislative history of the common carrier proviso demonstrates both the rationale for the exemption and its inapplicability to the SBC-Ameritech merger challenged in this litigation. The theory of the complaint is that SBC was uniquely positioned to threaten Ameritech's monopolistic exploitation Chicago land consumers, and would have entered the market but for the merger. FCC findings support this conclusion.[7] Such a strategy by SBC would have been

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7. "Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market and was actively implementing those entry plans at the time the merger was announced. Once the proposed merger was announced Ameritech suddenly abandoned these plans." FCC Order at ¶ 78. (App. at 48a).

"The evidence in the record indicates that SBC had plans to enter the mass market in Chicago building off its cellular base in that city, and could thus be viewed as a potential entrant into this market." FCC Order at ¶ 82. (App. at 52a).

Thus, both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions based on Ameritech's expansions into St. Louis

(Cont'd)

nonsensical in 1914, for new entry would not have been permitted absent lengthy regulatory proceedings where the entrenched incumbent would strongly argue that there was no public need for the entry. Thus, telephone as well as railroad mergers of this sort were likely to "inure to the benefit of the public." *See* Kintner, Legislative History of the Federal Antitrust Law and Related Studies 1748 (1978).

The Appellate Court's decision in *Navajo Terminals Inc. v. United States*, 620 F.2d 594, 601 (7th Cir. 1977) sheds no light on the argument or the Court of Appeal's faulty reasoning. The *Navajo* decision was based on a regime of regulated entry that rendered inappropriate the application of the potential competition theory upon which this complaint is based.

Further, in *Navajo*, there was a finding that there was no substantial competition between the two companies. In this case, the FCC Order established the opposite: prior to announcing the merger, Ameritech planned and declared its intention to enter SBC's St. Louis market, that SBC has also experimented with plans for entering local markets with its Rochester, New York Plan; SBC had also sought and received authorization to conduct local service in Illinois. The FCC Order explicitly found SBC and Ameritech had plans to enter each other's regions, and these plans were abandoned by the merger. FCC Order at ¶¶ 77, 78; (App. at 48a). Finally, the

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> (in SBC's territory) which would have occurred but for their merger, and SBC's plans to expand into Chicago (in Ameritech's territory). The FCC "conclude[d] that SBC was a significant potential entrant into Ameritech's region." FCC Order at ¶¶ 77, 78 & 83. (App. at 48a-54a).

FCC Order also stated SBC was a "significant potential entrant" into the Chicago residential market. FCC Order at ¶¶ 81, 82, 83. (App. at 50a).

Finally, in *Navajo* the Court stated that "the draftsman of § 7 held that without the common carrier proviso, § 7 might or would prevent merger of carriers which accomplished desirable line extensions." *Navajo*, 620 F.2d 601. Here, it is nearly impossible to consider the case to be a line extension, let alone desirable. The deregulated market does allow consumers access to phone service, SBC and Ameritech chose to merge rather than compete.

The factual record established that SBC's factored in payment of millions of dollars of fines, while exercising monopoly power includes a recurring deterioration of service combined with drastically increased charges to consumers including: virtually no meaningful competition/choice for local phone customers; worsened local residential service; major increase in fees and other charges; suffering sharp marketing practices; all the while SBC continues to turn a profit and threatens to worsen service further if regulation is not loosened more.

II. In Drafting the Telecommunications Act of 1996, Congress Clearly Intended That a Merger Between Two "Baby Bells" Would Not Be Exempt from Antitrust Scrutiny.

Prior to the 1996 Telecommunications Act, § 221(a) of the predecessor Communications Act actually empowered the FCC to confer antitrust immunity on telephone company mergers that the FCC found to be in the public interest. *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081, 1100 (7th Cir.

1982). Similarly, the final paragraph of § 7 of the Clayton Act exempted FCC-approved mergers from antitrust scrutiny. The 1996 Act repealed § 221(a) to remove this regulatory insulation and correspondingly amended § 7 of the Clayton Act, 15 U.S.C. § 18, to eliminate the FCC's ability to insulate transactions. 1996 Act §§ 601(b)(2), (3).

The Telecommunications Act of 1996 "represents a comprehensive effort by Congress to bring the benefits of deregulation and competition to all aspects of the telecommunications market in the United States, including especially local markets." *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 391 (7th Cir. 2000). The Act anticipated that incumbent local monopolists would strongly resist this effort, which would make it very difficult for new entrants to compete.[8]

Congress' failure to repeal the paragraph of § 7 of the Clayton Act, upon which the Court of Appeals relied to dismiss Petitioners complaint, is simply understood by the fact that in passing the 1996 Act Congress understood the phrase "common carrier" to be inapplicable to the reintegration of the baby Bell ILECs.

This explanation interprets both the Clayton Act and the Telecommunications Act in a manner "most compatible with

8. Indeed, pursuant to the Act, the FCC has recently fined SBC almost $2 million for improper conduct in frustrating new entry, and the D.C. Circuit has just found that SBC has not permitted effective competition in its areas of dominance. Communications Today, *SBC Pays $1.95 Mn Penalty*, Dec. 28, 2001; *Sprint Communications Co. L.P. v. FCC*, 2001 US App. Lexis 27292, *see* Dreazen, *Court Says SBC Overcharges Competitors, Tells FCC to Review Long-Distance Decision*, Wall Street Journal, Dec. 31, 2001.

the surrounding body of law in to which the provision must be integrated — a compatibility which, by a benign fiction, we assume Congress always has in mind." *Green v. Bock Laundry*, 490 U.S. 504, 528 (1989) (Scalia, J.).

The Court of Appeals reading of § 7 means that the baby Bells could all merge back into one company for purposes of providing local telephone service. Such an interpretation would so clearly frustrate the clear Congressional intent behind opening up local markets to competition that it would be a patently absurd result that Congress could not possibly have intended, and which this Court should refuse to sanction. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting).

The Conference Report on the Telecommunications Act makes this clear:

> The conference agreement adopts the House antitrust savings clause with modifications. The antitrust savings clause provides that except as provided in paragraphs two and three, nothing in this Act or the amendments made by the conference agreement shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. The clause was modified to include the repeal of section 221(a) of the Communications Act (47 U.S.C. 221(a)). Congress enacted section 221(a) in the days when local telephone service was viewed as a natural monopoly. Its purpose was to allow competing local telephone companies to merge without facing antitrust scrutiny. Thus, the statute provides

that when any two telephone companies merge, the Commission should determine whether the merger will be "of advantage to the persons to whom service is to be rendered and in the public interest." If so, the Commission can render the transaction immune from "any Act or Acts of Congress making the proposed transaction unlawful." In a world of regulated monopolies, this idea made sense.

However, section 221(a) could inadvertently undercut several of the provisions of the Telecommunications Act of 1996. The problem arises for at least two reasons. First, the critical term "telephone company" is not defined. In the old world of regulated monopolies, a definition probably was not necessary. However, in the new world of competition, many companies will be able to argue plausibly that they are telephone companies.

Second, section 221(a) allows the Commission to confer immunity from any Act of Congress (including the Telecommunications Act of 1996) after performing a public interest review. Section 221(a) could be used to avoid the cable-telco buyout provisions of the Telecommunications Act of 1996. Any cable company that owned any telephone assets could become a telephone company and be bought out by a BOC by applying for immunity under this section.

In addition, if immunity were conferred under section 221(a), it would allow mergers between

telecommunications giants to go forward without any antitrust or securities review. In the old world, the statute was usually used to confer immunity on mergers between non-competing Bell operating subsidiaries or mergers between Bells and small independents within their territories. Neither of these situations involved competitive considerations.

However, in the future, the conferees anticipate that cable companies will be providing local telephone service and the BOCs will be providing cable service. Mergers between these kinds of companies should not be allowed to go through without a thorough antitrust review under the normal Hart-Scott-Rodino process. The new language contains a conforming change to clarify that these mergers will now be subject to Hart-Scott-Rodino review. By returning review of mergers in a competitive industry to the DOJ, this repeal would be consistent with one of the underlying themes of the bill to get both agencies back to their proper roles and to end government by consent decree. The Commission should be carrying out the policies of the Communications Act, and the DOJ should be carrying out the policies of the antitrust laws. The repeal would not affect the Commissions ability to conduct any review of a merger for Communications Act purposes, e.g. transfer of licenses. Rather, it would simply end the Commissions ability to confer antitrust immunity.

The conference agreement adopts the House provision stating that the bill does not have

> any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.

Telecommunications Act of 1996 Conf. Report, No. 104-458, at 200, Jan. 31, 1996.

The decision of the Court of Appeals creates a major loophole in antitrust enforcement and completely frustrates the telecommunications policy of local competition expressed by the Congress.

CONCLUSION

The petition for writ of certiorari should be granted and the case set for briefing and argument.

Respectfully submitted,

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